UNIVERSITY OF TORONTO
FACULTY OF LAW

FAMILY LAW

Cases and Materials

Volume I

Brenda Cossman and Carol Rogerson
Faculty of Law
University of Toronto

2016-2017

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These materials are distributed solely for classroom use by students in the Faculty of Law, University of Toronto

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I. INTRODUCTION: THE FAMILY AND FAMILY LAW

A. THE FAMILY: DEFINITIONS AND DEMOGRAPHICS

The Family – Who and What is it?

For most people, the family is an institution that is familiar and easily identifiable. We simply take the idea for granted, and if asked, can usually provide a sensible definition of our own family. But, definitions of family vary considerably depending on the context and purpose. In the context of law, there is no singular definition of family, but rather, multiple definitions of familial relationships, like "spouse", "parent" or "child". In recent years, the question of who and what is a family has become increasingly complex, as the diverse ways in which people live in families has become more visible, and as restrictive definitions have been challenged in favour or broader and more inclusive definitions.

The materials in this introductory section raise some difficult questions about who and what is a family. The articles address the definitional question – how can we, if at all, define a family? The extracts also address some demographic changes in the compositions of families in Canada over the last several decades. Finally, the introductory section includes several landmark cases involving challenges to the legal definitions of family.

Excerpts from Statutes and International Documents

The Family Law Act, Ontario, 1986

> Whereas it is desirable to encourage and strengthen the role of the family; and whereas for that purpose it is necessary to recognize the equal position of spouses as individuals within marriage and to recognize marriage as a form of partnership; and whereas in support of such recognition it is necessary to provide in law for the orderly and equitable settlement of the affairs of the spouses upon the breakdown of the partnership, and to provide for other mutual obligations in family relationships, including the equitable sharing by parents of responsibility for their children;
> Therefore, Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario. enacts as follows: . . .

The International Covenant on Civil and Political Rights, 1966 (Canada signatory, 1976)

> **Article 23**
> 1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
> 2. The right of men and women of marriageable age to marry and to found a family shall be recognized.
> 3. No marriage shall be entered into without the free and full consent of the intending spouses.
> 4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision, shall be made for the necessary protection of any children.

B. Recent Challenges to Definitions of Family

The question of who and what is a family is one that the courts and the legislatures have, in recent years, been increasingly forced to address. Same-sex couples have brought a wide range of constitutional and human rights challenges to legal definitions of family that have excluded them. And in addressing these challenges, the courts have been forced to address the questions of who and what is a family, along with the underlying policy rationales for protecting and regulating families.

Canada (Attorney General) v. Mossop
[1993] 1 S.C.R. 554; 100 D.L.R. (4th) 659

[In August 1985, Brian Mossop filed a complaint with the Federal Human Rights Commission because he was denied bereavement leave to attend the funeral of his partner's father. Mossop and his partner had lived together since 1976. In April 1989, the Tribunal held that Mossop's employer – the Treasury Board – had discriminated against him on the basis of "family status". In the tribunal's view, it was "reasonable to conclude that homosexual couples may constitute a family". The Federal Court of Appeal reversed the Tribunal's decision. Marceau J. held that the denial of Mossop's bereavement leave was made on the basis of Mossop's sexual orientation, not his family status. Since the *Canadian Human Rights Code* did not (at that time) include "sexual orientation" as a prohibited ground, Mossop's claim was without basis. Marceau further held that the "family" had a clear 'core' meaning based on marriage and reproduction, a meaning which did not include same-sex couples.

At the Supreme Court of Canada, Chief Justice Lamer, writing for the majority rejected Mossop's appeal on the grounds of Parliament's clear intent, when it added the ground of "family status" to the *C.H.R.A.* in 1983, not to extend protection from discrimination on the basis of sexual orientation. In her dissenting opinion, Justice L'Heureux Dubé offered a very different approach, in which she emphasized the need for a broad and flexible approach to definitions of family.]

L'HEUREUX DUBÉ J. (dissenting): ...

The meaning of "family status"

Across the political spectrum, there is broad appreciation of the vital important of strong, stable families. Sylvia L. Law, in "Homosexuality and the Social Meaning of Gender", [1988] Wis. L. Rev. 187, suggests that this appreciation is hardly surprising since families are a central institution in most societies. She comments at pp. 220-1:

> Families bear primary responsibility for the nurture and acculturation of children, and for the care of the sick and the old. They provide communities that give personal meaning and value to our lives. Families mediate between the state and the isolated individual. They perform essential income redistribution functions, from adults in their prime earning years to the old, the young and the women who care for them. (Footnotes omitted.)

In her article "A Family Like Any Other Family: Alternative Methods of Defining Family in Law" (1990-91), 18 N.Y.U. Rev. L. & Soc. Change 1027 at p. 1029, Kris Franklin notes:

> Families have long been viewed as among the most essential and universal units of society. This sense of the shared experience of family has led to an often unexamined consensus regarding what exactly constitutes a family. Thus, while "[w]e speak of families as though we all knew what family are," we see no need to define the concepts embedded within the term.

This "unexamined consensus" leads many to feel that the term "family", in fact, has a plain meaning. This belief is reflected in the decision of the Court of Appeal where Marceau J.A. asks

Moreover, it would interfere with the appropriate balance between legislative and judicial power described in *Andrews*, which I have discussed earlier in these reasons.

[Justices Cory and Iacobucci, also writing for four members of the Court, held that section 15 was violated and that the violation was not a reasonable limit under section 1. Justice Sopinka, writing for himself alone, held that although the definition of "spouse" did violate section 15, it was a reasonable limit under section 1. In his view, "government must be accorded some flexibility in extending social benefits and does not have to be pro-active in recognizing new social relationships. It is not realistic for the Court to assume that there are unlimited funds to address the needs of all." (p. 249) He adopted what has been referred to as an "incremental" approach to equality rights: "Given the fact that equating same-sex couples with heterosexual spouses, either married or common law, is still generally regarded as a novel concept I am not prepared to say that by its inaction to date the government has disentitled itself to rely on s.1 of the Charter." (p. 252).

A majority of the Court thus rejected Egan's claim, but were not unanimous on the grounds for doing so. Although the Charter challenge was not successful, a majority of the court had found that the exclusion of same-sex couples violated s. 15. A few years later, the Court revisited these issues with a different result in the case of *M. v. H.*, which is reproduced later in the materials. In 2005 Canada legalized same-sex marriage.]

C. Legal Regulation of the Family

The collection of readings that follow provide an introductory framework for thinking about *legal* regulation of the family. The *Balfour* case and the reading from Olsen introduce the basic framework/tension of public vs. private. Sometimes the family is viewed as a private sphere into which the state does not/ should not intrude; but at other times public interests are found to justify state regulation. The balance between these two concepts is constantly shifting. The next reading by Glendon raises the issue of the dual function of family law—its pragmatic role as a system of dispute resolution and its normative or ideological role. The next two readings by Eekelaar and Dewar provide a historical overview, laying out some of the shifting purposes and techniques of state regulation of the family and identifying some of the distinctive features of the system of modern family law that began to emerge in the latter part of the 20th century. This is followed by a recent report describing the access to justice crisis being experienced in the family justice system, not just in Canada but across western jurisdictions. Finally, a reading from Hogg lays out the constitutional framework for making family law, specifically the division of law making powers between the federal and provincial governments.

(a) Public/ private

Balfour v. Balfour
[1919] 2 K.B. 571 (C.A.)

[This case deals specifically with the legal enforcement of agreements between family members. It is often included in contracts casebooks to illustrate the doctrine of "no intention to create legal relations." The specific issue of domestic contracts, and changed legal attitudes towards enforcement of such contracts, will be dealt with in detail subsequently in these materials. The case is included here as an illustration of a pervasive way of thinking about the family as a private realm into which the state should not intrude.

Subsequent to separation, a wife sought enforcement of an agreement made during the marriage. By this agreement, the husband was to provide £30 per week for her maintenance.]

II. MARRIAGE AND NULLITY

In this chapter, we examine the legal regulation of marriage and, more broadly, the ways in which law is implicated in the formation and recognition of family relationships. Although the creation of family relationships is often seen as a very private choice, there are a variety of ways in which law plays a central role in defining and shaping the conditions under which the individuals can and do make such choices. (On the theme of family privacy, see the extract from the article by Frances Olsen, above.) The focus of this chapter is the legal regulation of the validity of marriage, through which the law imposes restrictions on who can marry. If the requirements of a valid marriage are not met, the marriage is invalid, and the parties may seek a decree of nullity. The chapter begins, however, with some materials which deal with the shifting social and legal significance of marriage. The meaning of marriage has been significantly affected by increased social and legal recognition of non-marital relationships. This chapter thus also examines the legal system's treatment of unmarried couples, and the issue of whether it is appropriate for the state to attribute spousal status, and hence extend the rights and obligations of marriage, to non-marital relationships. And if such a choice is made, difficult issues arise of how spousal relationships are to be identified when the formal signal of marriage is absent.

A. The Significance of Marriage

(a) The Social Context of Marriage and other Intimate Relationships

Anne Milan, "Marital Status: Overview 2011"
Statistics Canada, July 2013, cat. no. 91-209-X, at 1-11 (footnotes omitted)
online at: http://www.statcan.gc.ca/pub/91-209-x/2013001/article/11788-eng.htm

This article analyses patterns related to marital status and nuptiality in Canada. Data on marital and conjugal status come primarily from the 2011 Census of Population, with comparisons to historical data where appropriate, particularly 1981.

In addition, data from the Canadian Vital Statistics Database on marriage and divorce are also analysed, with an emphasis on recent trends.*

Legal marital status

Legal marital status refers to the marital status of the person under the law (e.g., never married, married, divorced or separated, or widowed). In 2011, 46.4% of the population aged 15 and over was legally married, while 53.6% was unmarried—that is, never married, divorced or separated, or widowed—a widening of the gap first observed among the total population in 2001. In contrast, thirty years earlier, in 1981, 60.9% of the population aged 15 and over was married, while 39.1% was unmarried.

...

The decreasing share over time of the population that was married and the corresponding increase in the unmarried population may be related to a number of factors, including a higher average age at marriage and an increase in the divorced or separated population. In addition, a higher proportion of people live in common-law unions than in the past—either as a relatively shorter-term relationship prior to marriage or as a longer-term alternative, as well as a fairly large share of young adults who live in the parental home, most of whom have never been married.

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* The collection of marriage and divorce data in the Canadian Vital Statistics Database has been discontinued. The final year available for these data is 2008.

(c) Legal Recognition and Regulation of Non-Conjugal Personal Relationships

Can a "functional" approach to the legal regulation of personal relationships be confined to conjugal relationships (i.e., those involving a sexual relationship) or does it require legal recognition of other close, interdependent personal relationships when the state is assigning a variety of benefits, rights and obligations? Examples of such relationships might include siblings or adult children and parents residing together in the same household or even close friends who share a household. It is possible that even living together would not be required if the relationships otherwise involved significant interdependency, whether financial or emotional or both. If non-conjugal relationships were to be recognized, would the appropriate mechanism be ascription or an opt-in registration scheme? The newspaper articles which follow raise some of these questions and signal the possibility of further challenges under s. 15 of the Charter to legislation which only recognizes conjugal relationships.

"Single Judge Seeks Benefits of Couples"

Janice Tibbetts, *National Post*, Sept. 22, 2004

OTTAWA - One of Canada's senior judges is accusing the federal government of discriminating against her and other single public servants by denying them the same benefits as married people and common-law couples.

The failure to grant concessions to singles makes them "unworthy before the law" and violates the Charter of Rights protection against discrimination based on marital status, says Federal Court of Appeal Justice Alice Desjardins.

Her complaint is contained in a submission to the Judicial Compensation and Benefits Commission, which makes all-but-binding recommendations to the federal government on the amount that Canada's 1,100 federally appointed judges should be paid.

The government is balking at giving new benefits to Judge Desjardins, a prospect officials say would mean extending them to singles throughout the entire public service—a situation that would cause costs to skyrocket.

"It's an extraordinarily complex proposal," said Judith Bellis, judicial affairs director for the Justice Department. "The federal government is not taking the position that there was absolutely no merit in her submission ... but for the time being we are not going to entertain a judge-specific amendment. It would have to be consistent across all pension plans, and essentially, the government is not there yet."

Judge Desjardins, who earns $219,400 a year, pays 7% of her salary to her pension plan, the same amount as her co-workers with conjugal partners. But unlike them, she cannot name a survivor who would receive 50% of her pension when she dies.

She also says she should be able to register a "close family member" into her health and dental plans, just as married and common- law couples can sign up their spouses and dependent children.

Although she would contribute more than she pays as a single, it would still be less than she would spend to buy a private health plan.

"Under the present state of affairs, married judges, those living as common-law couples and same-sex couples enjoy benefits that are denied to single judges," the 70-year-old judge said.

She said economic dependence should not be a criterion for designating a beneficiary or health plan member, since people in conjugal relationships are not always financially dependent.

Judge Desjardins also rejects the premise that living together should be a condition, since spouses or partners do not always live together but still retain their partners' benefits.

"Some emotional ties or emotional dependency should suffice," Judge Desjardins said.

(c) The Opposite Sex Requirement

NOTE: Same-Sex Marriage and the Legal Recognition of Same Sex Relationships

The requirement that the parties to a valid marriage must be of the opposite sex was the cornerstone of the traditional definition of marriage. This requirement has come under increasing challenge over the course of the past two decades. Same sex marriage is now legally recognized in 18 countries, including Canada and, most recently, the United States. In addition same sex relationships are legally recognized in many other jurisdictions through a range of alternative legal mechanisms such as registered partnerships and civil unions and the extension of spousal rights and obligations on a *de facto* basis on the same terms as applied to common law opposite-sex couples. In some jurisdictions, including Netherlands, Canada and the U.K, recognition through these alternative legal mechanisms was the first step in a process that eventually led to recognition of same sex marriage.

Your readings will begin with an overview of the ways in which different jurisdictions have recognized same-sex relationships in order to place Canadian legal developments in a broader, international context. After this overview, the materials will focus more specifically on the legalization of same-sex marriage in Canada.

1. Alternative Mechanisms for Legal Recognition of Same Sex Relationships

European countries, beginning with Denmark in 1989, first recognized same-sex relationships through the introduction of a special legal regime—the "registered partnership". Registered relationships attract most of the legal effects of marriage, although in some jurisdictions there were initially restrictions with respect to adoption of children. Following Denmark's example, Norway (1993), Sweden (1994), Hungary (1995), Greenland (1995), Iceland (1995) and the Netherlands (1998) implemented registered domestic partnerships. Although the majority of the registered partnership regimes applied only to same sex couples, some jurisdictions, such as the Netherlands, also made them available to opposite sex couples.

Some common law jurisdictions also adopted the model of registered partnerships, calling them civil unions. Several American states adopted civil unions, beginning with Vermont in 2000. In 2004 the United Kingdom enacted the *Civil Partnerships Act* which granted same sex couples who register as civil partners under the act rights and responsibilities identical to civil marriage. New Zealand enacted similar legislation with its 2004 *Civil Unions Act*.

Both Germany and France implemented more limited forms of registered partnerships which extended some, but not all of the rights of marriage to registered partners. In Germany a federal law was passed in 2002 allowing gay couples to register and giving them inheritance, insurance, tenancy and hospital visiting rights. In 1999, when the National Assembly in France passed a bill improving rights for gay and unmarried heterosexual couples through creation of a form of civil union called the *pacte civil de solidarité* (in English: "civil pact of solidarity") commonly known as a PACS. The legislation gave couples the right to register their union at court and improved tax, inheritance and social security rights. Over time the rights granted in PACS have been expanded. Some American states also created more limited schemes of registered partnership that offer various subsets of rights offered to married couples.

As will be shown below, over time many of the jurisdictions that legislated registered partnerships or civil unions have gone on to legalize same-sex marriage.

In Canada, in 1993 the Ontario Law Reform Commission recommended the adoption of a domestic partnership regime for same sex couples, to allow them to opt into the rights and responsibilities of the *Family Law Act* (with the possibility of extending to other provincial legislation as well). See Ontario Law Reform Commission, *Report on the Rights and Responsibilities of Cohabitants under the Family Law Act* (1993). The Law Commission of

Canada, in *Beyond Conjugality* (2002), recommended the enactment of domestic partnership laws that would allow all couples to register their relationships. According to the Law Commission, the registration should not be restricted to conjugal relationships. However, domestic partnerships were not widely adopted in Canada. As will be shown below, only Quebec and Nova Scotia adopted that route.

Another alternative available in Canada, as in other jurisdictions such as Australia and Israel which recognize common law or *de facto* relationships and grant parties to such relationships most of the benefits and obligations of marriage, was to extend *de facto* spousal recognition to same-sex couples. In the aftermath of the Supreme Court of Canada's 1999 decision in *M.v.H.* there was a flurry of legislative activity at both the federal and provincial levels extending to same sex couples the same rights and responsibilities as opposite sex cohabiting couples.

In 2000, Nova Scotia passed legislation extending to same sex partners the rights and responsibilities previously afforded to opposite sex couples. The legislation also created a domestic partnership regime, allowing same and opposite sex couples to make a domestic partnership declaration which immediately confers on each partner the same rights and responsibilities as a married spouse. In 2002, Quebec adopted Bill 84 which amended Quebec's *Civil Code* to create a new status for gay partners, allowing them to enter into a "civil union."

The availability of alternate mechanisms for providing legal recognition to same-sex couples, such as schemes of registered domestic partnership or civil unions or the extension of spousal benefits on a *de facto* basis, became part of the debate about same-sex marriage. Some argued that these forms of recognition were preferable to the extension of same sex marriage or that their existence meant that there was in fact no denial of equality. On the other hand, these alternate mechanisms may have paved the way for recognition of same sex marriage.

2. Same Sex Marriage

In 2001, the Netherlands became the first country in the world to recognize same sex marriage, extending to same sex marriages the same legal rights and responsibilities that attach to opposite sex marriages. Belgium followed suit in 2003.

In Canada, same sex marriage became available in Ontario on June 3, 2003 as a result of the Ontario Court of Appeal decision in *Halpern v Canada (Attorney General)* (2003), 225 D.L.R. (4^{th})529. Subsequent court decisions made same-sex marriage available in almost all the other provinces, with the exception of P.E.I. and Alberta. Federal legislation making same-sex marriage legal throughout the country, the *Civil Marriage Act,* came into force on July 20, 2005.

Meanwhile, on June 30, 2005 Spain had become the third country to legalize same-sex marriage, making Canada the fourth. Subsequently, same-sex marriage has been legalized in South Africa (2006), Norway (2009) and Sweden (2009), Portugal (2010), Iceland (2010), Argentina (2010), Denmark (2012), Brazil (2013), France (2013), Uruguay(2013), New Zealand (2013), Britain (2014), Luxembourg (2015) and the United States (2015), bringing the number of countries recognizing same sex marriage to 18 (as of June, 2015). Same-sex marriage will become into force in Finland in 2017 and will be legal in Ireland following approval of a referendum in May 2015 to amend the country's constitution to provide that "marriage may be contracted in accordance with law by two persons without distinction as to their sex". The referendum requires ratification by the Oireachtas before going into legal effect, which is expected by the autumn of 2015.

The issue of same-sex marriage in the United States has been the focus of considerable social and legal controversy, resulting in what was for many years a shifting patchwork of legal recognition. In the United States marriage is regulated at the state level. Over time while the list of states recognizing same-sex marriage grew (beginning with Massachusetts in 2003 and growing to 36 states and the District of Columbia by 2015), state constitutional amendments explicitly barring the recognition of same-sex marriage were in force in many other states.

(d) The Requirement of Capacity to Consummate

At common law, incapacity on the part of one of the spouses to consummate the marriage gives rise to a voidable marriage. The common law rule requires *incapacity*; a simple absence of consummation or a willful refusal on the part of one of the spouses to consummate does not constitute grounds for an annulment. This common law requirement has not been legislatively codified or revised in Canada.

Gajamugan v. Gajamugan
(1979), 10 R.F.L. (2d) 280 (Ont. S.C.)

CARRUTHERS J.:—This is an action for annulment. The parties went through a civil form of marriage on 23rd June 1978, followed by a religious ceremony on 24th June 1978. Following the religious ceremony on 24th June, in the evening, the parties retired to a room in a hotel and there slept together for the first time.

The plaintiff's evidence and the defendant's evidence consisted, in part, of an extremely detailed account of their respective memories of what occurred during the evening and night that they first slept together. The effect of the plaintiff's evidence is that he attempted to have sexual intercourse with the defendant but as soon as he touched her face with his hand he had a mental revulsion to the marks on her face. The effect of this reaction, so far as sexual intercourse is concerned, according to the plaintiff, was that his penis, which had become erect, became flaccid. He said that this occurred within a minute. There never was any penetration. Thereafter, the parties slept in the same bed, but, as the plaintiff said, "apart". This abortive attempt at sexual intercourse occurred about 10:30 or 11:00 p.m. on the evening of 24th June 1978. No further attempts were made over the course of that evening. The parties slept together again on the evening of 25th June 1978 and a further attempt was made at sexual intercourse and, according to the plaintiff, "the same thing happened". He was not able to proceed with intercourse. There was no penetration. He said in evidence that when he kissed and touched the defendant's face he "lost his erection". They again slept together, that is, in the same bed, but, as the plaintiff said, "apart". There were no further attempts made at sexual intercourse while the parties were together in Malaysia where they were married.

As planned the plaintiff left Malaysia to return to Canada on 27th June. The defendant was unable to accompany him because of difficulty with her visa. She arrived in Woodstock on 3rd January 1979. On the night of her arrival; the parties again attempted sexual intercourse. The plaintiff said again that he lost his erection because of "the same mind", due to a revulsion because of the marks on the defendant's face. He described it as being a repeat of what had happened on the previous attempts at intercourse. He said it was "in my mind" and it was caused by "touching". That night the plaintiff slept in a separate room. They never slept together again and no further attempts at sexual intercourse have ever been made.

The plaintiff said in evidence that he tried to overcome the problem by simply trying to forget it. He said he could not. The plaintiff denies that he had any problem of impotence, having had a child by his first marriage and, from his description, a reasonably active sexual life during the course of that marriage and on occasions thereafter, prior to his marriage to the defendant. He had no idea before his marriage to the defendant that he would have the problems he now describes as having had on the occasions when he attempted sexual intercourse with the defendant. His first knowledge was in the hotel where they first slept together on the evening of 24th June 1978.

The defendant remained with the plaintiff in his house in Woodstock for nine days after her arrival. He said that during that time he could not look at her face. He could not talk with the defendant and after three days he did not want to come home. He could not eat what she cooked.

(e) The Requirement of Monogamy

(i) Canadian Law

Under Canadian law, marriage is understood to be a monogamous relationship. A marriage to a person already married is void *ab initio* regardless of whether there is a good faith belief that the first marriage had been terminated by death or was void. The relevant time for assessing the validity of the second marriage is at the time of the marriage ceremony. A person's spouse is presumed to be dead following seven years without hearing from the spouse. However, if the spouse who was presumed dead returns at any time, the second marriage is void. (Most people in this situation would now obtain a no-fault divorce after a one-year separation rather than relying upon the presumption of death.) Until 2015 this requirement of dissolution of any prior marriages derived from the common law. However, in 2015, as a result of the passage by Parliament of the inappropriately named *Zero Tolerance for Barbaric Cultural Practices Act,* S.C. 2015, c. 29, s. 2.3 was added to the federal *Civil Marriage Act*:

> **2.3 Previous Marriages.** No person may contract a new marriage until every previous marriage has been dissolved by death or by divorce or declared null by a court order.

Polygamous relationships are recognized by Ontario family law in one respect. By virtue of s. 1(2) of the Ontario *Family Law Act,* a marriage that is, or has at any time been, polygamous and was validly contracted overseas is deemed to be a marriage for the purposes of proceedings under the *Act* – i.e., proceedings for division of property, occupation of the matrimonial home, support, and dependents' claims for damages against third parties in case of injury or death of a family member.

Even if polygamous relationships are not recognized as legal marriages in Canada, there is the possibility that the parties to such relationships might seek the remedies available to unmarried couples (see the *Basi v Dhaliwal* case from British Columbia described below).

In Canada, in addition to the family law rules governing bigamous and polygamous relationships, there are *Criminal Code* provisions prohibiting both bigamy and polygamy:

> **Offences Against Conjugal Rights**
>
> **290.** (1) **Bigamy** — Every one commits bigamy who
> (a) in Canada,
> (i) being married, goes through a form of marriage with another person,
> (ii) knowing that another person is married, goes through a form of marriage with that person, or
> (iii) on the same day or simultaneously, goes through a form of marriage with more than one person; or
> (b) being a Canadian citizen resident in Canada leaves Canada with intent to do anything mentioned in subparagraphs (a)(i) to (iii) and, pursuant thereto, does outside Canada anything mentioned in those subparagraphs in circumstances mentioned therein.
> (2) **Matters of defence** — No person commits bigamy by going through a form of marriage if
> (a) that person in good faith and on reasonable grounds believes that his spouse is dead;
> (b) the spouse of that person has been continuously absent from him for seven years immediately preceding the time when he goes through the form of marriage, unless he knew that his spouse was alive at any time during those seven years;
> (c) that person has been divorced from the bond of the first marriage; or
> (d) the former marriage has been declared void by a court of competent jurisdiction.
> (3) **Incompetency no defence** — Where a person is alleged to have committed bigamy, it is not a defence that the parties would, if unmarried, have been incompetent to contract marriage under the law of the place where the offence is alleged to have been committed.

(4) **Validity presumed** — Every marriage or form of marriage shall, for the purpose of this section, be deemed to be valid unless the accused establishes that it was invalid.

(5) **Act or omission by accused** — No act or omission on the part of an accused who is charged with bigamy invalidates a marriage or form of marriage that is otherwise valid.

291. (1) **Punishment** — Every one who commits bigamy is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

...

293. (1) **Polygamy** — Every one who

(a) practises or enters into or in any manner agrees or consents to practise or enter into

(i) any form of polygamy, or

(ii) any kind of conjugal union with more than one person at the same time, whether or not it is by law recognized as a binding form of marriage, or

(b) celebrates, assists or is a party to a rite, ceremony, contract or consent that purports to sanction a relationship mentioned in subparagraph (a)(i) or (ii),

is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

(2) **Evidence in case of polygamy** — Where an accused is charged with an offence under this section, no averment or proof of the method by which the alleged relationship was entered into, agreed to or consented to is necessary in the indictment or on the trial of the accused, nor is it necessary on the trial to prove that the persons who are alleged to have entered into the relationship had or intended to have sexual intercourse.

As you will read below, the polygamy provisions of the *Criminal Code,* which define polygamy very broadly, were found to be consistent with the Canadian Charter of Rights and Freedoms in a constitutional reference sent to the British Columbia Supreme Court: (see *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588), although s. 293 was "read down" to exclude "informal" polyamorous relationships that do not involve any rite or ceremony signifying community recognition and approval.

Finally, immigration rules prevent the immigration into Canada of those involved in polygamous relationships. Persons applying to become permanent residents are permitted to have only one spouse. Individuals in polygamous relationships are required to convert their marriage to a monogamous relationship. However, recent amendments to the *Immigration and Refugee Act,* S.C. 2001, c. 27 brought about as a result of the passage by Parliament of the ill-named *Zero Tolerance for Barbaric Cultural Practices Act,* S.C. 2015, c. 29, will, when they come into force on a date still to be fixed by the federal government, impose even stricter immigration controls on those involved in polygamous relationships. The amendments will add a new s. 41.1, to the Act, which makes the practice of polygamy a ground of inadmissibility:

41.1 (1) *Polygamy.* A permanent resident or a foreign national is inadmissible on grounds of practising polygamy if they are or will be practising polygamy with a person who is or will be physically present in Canada at the same time as the permanent resident or foreign national.

(2) Interpretation. For the purposes of subsection (1), polygamy shall be interpreted in a manner consistent with paragraph 293(1)(*a*) of the *Criminal Code*.

As a result of the new amendments, permanent residents who have been allowed to enter the country could subsequently become inadmissible and hence subject to removal if they begin or resume a polygamous relationship, even absent any conviction under the *Criminal Code*.

(ii) Polygamy and Polyamory

Monogamy is not an essential feature of marriage in all cultures. Polygamy has traditionally been practiced or accepted in some religious and cultural groups from Africa, Asia, and the Middle East, as well as fundamentalist Mormons. Islamic law sanctions polygamy in certain circumstances. The concept of marriage which is embodied in Canadian law and that of most other western countries owes its origins to Romano-Christian beliefs about marriage as a monogamous and life-long commitment.

Some argue that the values which originally supported our concept of monogamous marriage may no longer be widely accepted in a liberal, multi-cultural society in which separation, divorce and sequential re-partnering (sometime referred to as "serial polygamy") are widely-accepted and common.

Others argue new justifications for monogamy grounded in values of gender equality reflected in international human rights documents. For example, the 1981 *U.N. Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) which commits signatories to eliminating gender discrimination in marriage and family life and to ensuring the equal rights of men and women therein. Although the Convention, to which Canada is a signatory, does not explicitly refer to polygamy, the UN Committee that monitors the implementation of the Convention has consistently inveighed against polygamy, and in 1992 issued a General Recommendation that included the following:

> Polygamous marriage contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependants that such marriages ought to be discouraged and prohibited. The Committee notes with concern that some States parties, whose constitutions guarantee equal rights, permit polygamous marriage in accordance with personal or customary law. This violates the constitutional rights of women, and breaches the provisions of article 5(a) of the Convention.

Australia struggled with these issues in the 1990s. In 1992, the Australian Law Reform Commission released *Multiculturalism and the Law* [ALRC Report No. 57, (1992) Australian Government Publishing Service, Canberra] a report commissioned in light of the Australian government's 1989 official policy on multiculturalism. One of the policy's objectives was "to promote equality before the law by systematically examining the implicit cultural assumptions of the law and the legal system to identify the manner in which they may unintentionally act to disadvantage certain groups of Australians'. In its Report, the Commission stated (at 66-67):

> Families play a central role in the development of a person's cultural identity and the transmission of culture, language and social values. … Because of the important roles families have, the impact of law and policy on the family is of special significance in a multicultural society. Laws and policies based on one view or one set of assumptions about family relationships which do not take into account the diversity of family arrangements in Australian society may impact harshly on communities or individuals whose family relationships are differently defined.

The basic principle that the Commission set for itself was that the law should not inhibit the formation of family relationships, but should, "so far as possible, respect and protect the relationships that people choose for themselves" (at 90).

The Commission considered whether, consistently with its general approach to family law in a multicultural society, the law should recognize as valid a "marriage" entered into in Australia that would be polygamous and, if so, whether such a marriage should be recognized as valid for all purposes or only for limited purposes. A significant minority of Australians belong to religious or cultural groups which traditionally accepted polygamy. For example, certain Aboriginal peoples practice polygamy and polygamy is accepted within Islam, although the extent of this practice varies significantly between countries. In addition, the Commission recognized that failing to recognize polygamous marriages highlights the inconsistencies in the present law of many western countries, which allow: 1) a person to marry as many times as he or she wishes as long as the earlier relationship is terminated; 2) a person who is married to be simultaneously in a marriage-like relationship with another person and to have children with more than one partner and 3) a person who is not married to have a marriage-like relationship with more than one partner. Moreover, the law attaches some of the incidents of marriage to the second relationship.

In the end, the Commission's Report recommended that polygamous marriages should <u>not</u> be recognized as valid marriages at all. The Report stated that there was very little support in the

Australian community for the recognition of polygamous marriages, and that such recognition would compromise Australia's commitment to gender equality. The Commission stated:

> In most societies where [polygamy] is permitted, men, but not women, have the right to take more than one spouse. Unless the right to take more than one spouse applied equally to men and women, polygamy would clearly offend the principles of sexual equality which underlie Australian law. [ALRC, *Multiculturalism: Family Law* (1991) Discussion Paper No. 46 at 27-28]

As you read the materials below that deal with legal recognition of polygamous relationships, remember that issues of legal recognition arise in many different contexts (i.e. family law, private international law, criminal law,) and it may be possible reach different answers in different contexts:

- Under marriage law there is the question of whether monogamy is a requirement for a valid marriage entered into in that jurisdiction.
- A separate question is whether to recognize a foreign polygamous marriage that is recognized as valid in the jurisdiction it was entered into. A jurisdiction which allows only monogamous marriage may still be willing to recognize as valid a foreign polygamous marriage.
- Even if a polygamous relationship is not recognized as a marriage, there is the issue of whether parties to that relationship can apply for remedies available to unmarried couples.
- Finally, there is the question of whether the practice of polygamy relationship should be subject to criminal sanction. It is perfectly possible for a jurisdiction restrict marriage to two parties, but not to punish the practice of polygamy using the severe sanction of the criminal law.

"Polygamous spouses covered under B.C. family legislation, judge holds"
The Lawyer's Weekly, November 1, 1991

VANCOUVER—Polygamous spouses are covered by the B.C. *Family Relations Act*, a Provincial Court judge here has ruled.

The decision is believed to be the first pronouncement in the country on polygamous marriages.

In an oral judgment handed down in August, Judge Jane Auxier held that parries to a polygamous relationship are included in the definition of "spouse" in the provincial legislation.

The judge found that Parsini Basi was entitled to spousal support from her live-in companion of 10 years, Gurmail Dhaliwal, even though Mr. Dhaliwal was legally married to and lived with Ms. Basi's sister at the same time.

Judge Auxier rejected arguments from the lawyer for Mr. Dhaliwal that the bigamy sections of the *Criminal Code* prohibited the *Family Relations Act* from applying to multiple spouses.

"Ours is a multi-cultural society and I think we can expect to see different living arrangements," she said.

John Noble of Vancouver's Young Noble and Wirsig represented Ms. Basi.

He told *The Lawyers Weekly* Mr. Dhaliwal was married with three children when his sister-in-law arrived from India and moved in with him.

Ms. Basi subsequently bore two children fathered by her brother-in-law.

Mr. Dhaliwal worked in a foundry while his legal wife worked night shift in a bakery and Ms. Basi looked after the family.

The relationship continued for 10 years until February of this year when Ms. Basi left with her two children.

A June 1991 application for child support was granted without any problems because there was no question Mr. Dhaliwal was the father of the children.

However, when it came to spousal support, Judge Auxier said she first had to deal with the threshold question of whether the court had jurisdiction over polygamous relationships.

For the purposes of maintenance applications, the *Family Relations Act* defines "spouse" as an unmarried couple who have lived together for at least two years.

Counsel for Mr. Dhaliwal, Vancouver sole practitioner Patricia Yaremovich, submitted the definition referred only to the singular and should be interpreted in such a way that a man can only be a husband to one woman at a time.

Mr. Noble, however, pointed out that the purpose of the statute was to extend support to all wives and not just legal wives so as to ensure that a woman who has relied on a relationship for financial security does nor suddenly find herself without monetary support when the relationship ends.

Noting Ms. Basi had lived with Mr. Dhaliwal for 10 years, had two children by him and had not worked outside the home, Judge Auxier ruled the woman fits within the wrong this Act was meant to correct.

According to Mr. Noble, the ruling, which has not been appealed, means the *Family Relations Act* must be interpreted to include multiple spouses.

"You can end up with obligations to pay spousal maintenance to a plurality of wives or a plurality of husbands."

He explained that the whole point of the Act is to ensure you do not have a spouse who "is led down the garden path for 10 years taking care of the house, not learning English or educating himself or herself, nor learning a trade because they are led to believe they have got some security [in the relationship]."

Mr Noble added that while there was no evidence on this point, he understands the living arrangement of Mr. and Mrs. Dhaliwal and Ms. Basi is "less rare" in Sikh society than it is in the Anglo-Saxon culture.

"If we are going to call ourselves a multi-cultural society we should not allow something that an Anglo-Saxon society would frown upon to prevent people from taking advantage of the law," he said.

NOTE: THE B.C. "POLYGAMY REFERENCE"

In Canada, the constitutionality of s. 293 of the *Criminal Code* has been questioned for many years. The issue was sent by way of reference to the B.C. Supreme Court, which released its decision in November of 2011: *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588—often referred to simply as the Polygamy Reference. The reference case was proceeded by a criminal prosecution against two religious leaders of a fundamentalist Mormon sect in southwestern British Columbia ("Bountiful") that practices polygamy. After the criminal prosecution was dismissed on procedural grounds, B.C.'s Attorney General referred two questions relating to the constitutionality and interpretation of s. 293 to the Supreme Court of British Columbia:

> a) Is section 293 of the *Criminal Code of Canada* consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars and to what extent?
>
> b) What are the necessary elements of the offence in section 293 of the *Criminal Code of Canada*? Without limiting this question, does section 293 require that the polygamy or conjugal union in question involved a minor, or occurred in a context of dependence, exploitation, abuse of authority, a gross imbalance of power, or undue influence?

[The parties and their arguments are summarized as follows in the headnote to the case:
The federal and provincial Crowns and other interested parties argued in favour of the provision's constitutionality. The Civil Liberties Association, the Canadian Association for Free Expression,

the Polyamory Advocacy Association and the Fundamentalist Church of Jesus Christ of Latter Day Saints challenged the constitutionality of s. 293. The Crown submitted that s. 293 was consistent with the Charter, as the practice of polygamy raised an inherent and reasoned apprehension of harm to women, children, society and the institution of monogamous marriage. The Crown's alternative position was that any infringement of Charter rights by the provision was demonstrably justified in a free and democratic society. The challengers submitted that the provision was a product of anti-Mormon sentiment and constituted an unacceptable intrusion upon the freedoms of religion, expression, association and equality as protected by the Charter. They argued that those infringements were not justified under s. 1 of the Charter. The challengers submitted that polygamy was not harmful *per se*, as the apprehended harm was contingent upon factors related to a particular relationship or community.

Justice Bauman upheld the constitutionality of s. 293, finding that any Charter infringements of freedom of religion could be justified under s. 1 given the reasoned apprehension of harms arising from polygamy. The only constitutional flaw found by Justice Bauman was the overbreadth of the statute in exposing young persons to criminal prosecution. To the limited extent that the provision included children between the ages of 12 and 17 who married into polygamy, it was found to be inconsistent with s. 7 of the Charter. In respect of the second question, Justice Bauman found that the necessary elements of the offence in s. 293 did not require that the polygamy or conjugal union in question have involved a minor or occurred in a context of dependence, exploitation, abuse of authority, a gross imbalance of power or undue influence. However, despite the broad wording of s. 293 in referring to "every one who practices or enters into … any form of conjugal union with more than one person at a time" he concluded that the legislative intention was to protect the institution of marriage and thus that the provision was only intended to apply to those conjugal relationships that were marriage-like in the sense of involving a sanctioning of some formality [i.e. a rite or ceremony] connoting community recognition and approval. Thus the majority of multiple partner polyamorous relationships would be excluded from the scope of the criminal prohibition.]

Reference re: Section 293 of the Criminal Code of Canada
2011 BCSC 1588, [2011] B.C.J. No. 2211

BAUMAN CJBC:

I. INTRODUCTION

[1] By s. 293 of the *Criminal Code of Canada*, R.S.C. 1985, c. C-46, (initially in 1890 and periodically since then in successive revisions to the *Code*), Parliament has prohibited the practice of polygamy. British Columbia asks this Court to declare whether this prohibition is consistent with the freedoms guaranteed [under the Charter]. … .

[2] Mr. Justice Binnie, in extra-judicial comments … has suggested that the direction of any constitutional inquiry depends much upon how the good advocate, the good judge, the good appellate panel (and so on) characterizes the essential issue before the Court. Here, the Attorney General for British Columbia has said in opening that the case against polygamy is all about harm. Absent harm, that party accepted that s. 293 would not survive scrutiny under the *Charter*.

[3] The challengers, led by the *Amicus Curiae,* counter (primarily) that this case is about a wholly unacceptable intrusion by the State into the most basic of rights guaranteed by the *Charter* - the freedom to practice one's religion, and to associate in family units with those whom one chooses.

[4] Which characterization shoulders the burden of persuasion here? As Binnie J. said, the answer largely dictates the direction of the analysis.

(f) Age Requirements for a Valid Marriage

The age at which a person can validly many is a matter within federal jurisdiction under s. 91(26) of the *Constitution Act, 1867*. Until very recently, federal inaction in this area meant that the common law rules applied. According to the common law, the marriage of a child of less than seven years of age is void *ab initio*. The marriage of a male older than seven years but younger than 14 years, or a female older than seven but younger than 12 years is voidable at the instance of the underage party.

Federal inaction prompted the provinces to attempt to fill the void. Provincial legislation governing the issuance of marriage licenses effectively made the age at which a person may marry higher than that at common law. Under the *Marriage Act* (Ontario), R.S.O. 1990, c. M-3, for example, a person must be 18 years old before he or she can obtain a marriage license. Section 5 of the *Act* provides that a person between 16 and 18 years may obtain a marriage license with parental consent. Section 6 provides that where such consent is not available or is unreasonably or arbitrarily withheld, the person in respect of whose marriage the consent is required may apply to a court for an order dispensing with consent.

In 2015, in an effort to deal with forced marriage, Parliament passed legislation (the unfortunately named *Zero Tolerance for Barbaric Cultural Practices Act,* S.C. 2015, c. 29, formerly Bill S-7) amending the *Civil Marriage Act* to include a minimum age requirement of 16 for marriage, in addition to a requirement of full and enlightened consent. The newly added s. 2.1 of the Act reads:

> **2.2 Minimum age.** No person who is under the age of 16 years may contract marriage.

As well, as will be described in more detail below in the discussion of Bill S-7 and forced marriage, the *Criminal Code* has been amended to reinforce the minimum age and consent requirements.

(g) Prohibited Degrees of Consanguinity and Affinity

Persons related too closely by consanguinity (relationships of blood) and affinity (relationships of marriage) are prohibited from marrying. The prohibited degrees of consanguinity and affinity at common law were set out in Archbishop Parker's Table of 1563, as reproduced in the Book of Common Prayer of the Church of England. This list of prohibited degrees was incorporated into Ontario law through federal legislation, the *Annulment of Marriages Act (Ontario)*, R.S.C. 1970. This list was amended by the *Marriage Act*, R.S.C., 1970, which removed the following prohibitions: wife's sister, wife's niece, husband's brother, and husband's nephew. The list of prohibited degrees as it stood after the 1970 reforms was set out as follows in Form 1 under the Ontario *Marriage Act*:

> **Degrees of affinity and consanguinity which, under the statutes in that behalf, bar the lawful solemnization of marriage.**
>
> | **A man may not marry his** | **A woman may not marry her** |
> |---|---|
> | 1.Grandmother | 1. Grandfather |
> | 2. Grandfather's wife | 2.Grandmother's husband |
> | 3. Wife's grandmother | 3. Husband's grandfather |
> | 4. Aunt | 4. Uncle |
> | 5. Wife's aunt | 5. Husband's uncle |
> | 6. Mother | 6. Father |
> | 7. Step mother | 7. Step father |
> | 8. Wife's mother | 8. Husband's father |
> | 9. Daughter | 9. Son |
> | 10. Wife's daughter | 10. Husband's son |
> | 11. Son's wife | 11. Daughter's husband |
> | 12. Sister | 12. Brother |

13. Granddaughter	13. Grandson
14. Grandson's wife	14. Granddaughter's husband
15. Wife's granddaughter	15. Husband's grandson
16. Niece	16. Nephew
17. Nephew's wife	17. Niece's husband

The relationships set forth in this table include all such relationships, whether by the whole or half blood.

Bruce Ziff discussed some of the rationales underlying these prohibited degrees of consanguinity and affinity, in "Recent Developments in Canadian Law: Marriage and Divorce" (1986), 18 *Ottawa Law Review 121,* at 135-136.

> The traditional policies behind affinal restrictions, put succinctly, are the insulation of the nuclear or extended family from sexual meddling, the promotion of marriage outside of the family and the preservation of perceived societal norms or Judeo-Christian religious beliefs. Restrictions based on consanguinity have been supported on these grounds, but there is, as well, the additional concern that genetic and even eugenic defects are more common in the offspring of close blood relations. The [1970] amendments reflect an abandonment of the first cluster of reasons, presumably either because they no longer reflect public policy, or because marriage prohibitions are seen as ineffective vehicles with which to pursue these goals. A reduction in the restrictions based on consanguinity seems in accord with current scientific opinion that the physical dangers are not as significant as once was thought, particularly where the blood relationship between the parties is not close.

The lack of justification for many of the marriage restrictions based on affinity and consanguinity led to a significant reform of the law in 1990 with the passage of legislation, the *Marriage (Prohibited Degrees) Act*, S.C. 1990, c. 46, which reduced the list of restriction to those based on lineal relationships of consanguinity and relationships of brother and sister. The *Hansard* Report 7 June 1990 (third reading in the Senate) provides the following statement about the intention of the legislative reform:

> In the case of persons related by blood, Bill S-14 reaffirms the law that persons may not marry if they are related lineally or if they are brothers or sisters, but it otherwise relaxes the law to allow marriage between persons who are related as uncle and niece or as aunt and nephew.
>
> In the case of persons related by marriage, it clarifies the law by providing that a person whose marriage has been dissolved by divorce may marry the brother or sister, nephew or niece, or uncle or aunt of the divorced spouse; something that is not now permitted under the law. There would be no prohibition against marriages involving step-relationships.

Note that an amendment was made to the original Bill providing that relationships of adopted persons within the family were to be treated "as if they were natural relationships", an arrangement consistent with provincial adoption law and policy. Should the legislation also have included a prohibition on marriages between a step-parent and step-child, in cases where the step-parent had assumed a parental role? Legislation in England does contain such a restriction.

The form under the Ontario *Marriage Act* setting out the prohibited degrees was changed to reflect the new law:

Degrees of consanguinity which, under the *Marriage (Prohibited Degrees) Act* (Canada), bar the lawful solemnization of marriage.

A man may not marry his	**A woman may not marry her**
1. Grandmother	1. Grandfather
2. Mother	2. Father
3. Daughter	3. Son
4. Sister	4. Brother
5. Granddaughter	5. Grandson

The relationships set forth in this table include all such relationships, whether by the whole or half blood or by order of adoption.

In 2005 as a result of the federal *Civil Marriage Act*, which gave recognition to same-sex marriage, the *Marriage (Prohibited Degrees) Act* was amended to clarify the operation of the prohibited degrees with respect to marriage of siblings of the same sex. (The existing form under the Ontario *Marriage Act* was repealed after these changes, no new form was created to replace it, and finally in 2009 a legislative amendment repealed the requirement to have such a form.)

"Incest: an age-old taboo"

BBC News, March 12, 2007 at http://news.bbc.co.uk/2/hi/europe/6424337.stm

In 2007, a German brother and sister took their fight for the right to a sexual relationship to the country's highest court, the BBC News website's Clare Murphy looks at the history of the incest taboo and how it is changing.

When Henry VIII wanted to be rid of Anne Boleyn, he made sure she was accused of one particularly heinous crime: sleeping with her brother.

According to the great modern anthropologist Claude Levi Strauss, the incest taboo has been the driving force of humankind. By forcing man to find a mate outside the home, disparate, warring clans have been brought together and society has flourished.

Others see the abhorrence for sleeping with relatives as having a primarily biological motive - a human instinct to prevent defective genes being passed down.

"Society has long relied on the family unit as its basis," says sociologist Vikki Bell. "That's why it has been so important to keep family roles clear."

It is not hard to see how incest can make family life very complicated, potentially turning brothers into fathers and mothers into sisters.

Yet while most are clear that sexual acts between a related adult and child constitute abuse and as such must be punished, there is no modern consensus on whether society has the right to ban consensual sex between siblings, or indeed parent and adult child.

Too close to attract

If Sigmund Freud is to be believed, everyone would be sleeping with their close relatives given half a chance. Society had to keep these deep-seated desires in check, he argued.

No need, countered Finnish anthropologist Edward Westermarck, who said that if anything, close association in childhood automatically created sexual aversion - in other words, familiarity breeds contempt.

His theory was tested in a study of unrelated children growing up together in an Israeli kibbutz. Despite the parents being keen on their children forming relationships, the children themselves had no sexual interest in one another as they began to mature.

The theory was also backed up by another study in Taiwan by a US academic Arthur Wolf.

He looked at two forms of marriage - one in which the two partners married as adults, and another in which the wife was taken into her future husband's household as a young child, growing up with him.

The latter produced more adultery, more divorces and fewer children than the former. This, he said, indicated closeness as children stifled rather than stimulated sexual feelings.

Locked up

But these cases, which in any event did not involve actual blood relatives, fitted uncomfortably with the only well documented case of a society which embraced sibling incest outright - that of Roman Egypt.

For about 300 years, a significant proportion of all marriages recorded were between brothers and sisters.

The relationships appear to have been both social and reproductive.

(h) Consent as a Requirement for a Valid Marriage

Both parties to a marriage must freely consent to go through a marriage ceremony with each other. A lack of capacity is a matter going to the essential validity of a marriage and is thus a matter within federal jurisdiction under s. 91(26) of the *Constitution Act, 1867*. Until very recently, this requirement was not codified and was simply governed by the common law. However, in 2015, as part of its attempt to deal with forced marriage, Parliament passed legislation (the unfortunately named *Zero Tolerance for Barbaric Cultural Practices Act,* S.C. 2015, c. 29) amending the *Civil Marriage Act* to include a requirement of "full and enlightened consent" for marriage. The newly added s. 2.1of the Act reads:

> **2.1 Consent required.** Marriage requires the free and enlightened consent of two persons to be the spouse of each other.

Consent may be affected by lack of understanding, mistake, duress, fraud, or motive. Mental incapacity leads to a void marriage, but duress and mistake give rise to voidable marriages.

Lack of understanding. A party to a marriage must have the requisite capacity to understand the basic nature of a marriage and its obligations. Capacity may be affected by intoxication, drugs, age or mental illness. The level of understanding required is very low and requires only a basic appreciation of the roles of the parties to the union. In *Durham v. Durham* (1885), 10 P.D. 80 at 81-2, the Court held that "it appears to me that the contract of marriage is a very simple one, which does not require a high degree of intelligence to comprehend. It is an engagement between a man and woman to live together, and love one another as husband and wife, to the exclusion of all others." The courts have held that the appropriate time to determine whether a party to a marriage had the requisite mental capacity to marry is at the time of the ceremony.

Provincial marriage acts may include provisions reinforcing this requirement of capacity. Thus s. 7 of the Ontario *Marriage Act* reads:

> **7. Persons lacking mental capacity.** – No person shall issue a licence to or solemnize the marriage of any person who, based on what he or she knows or has reasonable grounds to believe, lacks mental capacity to marry by reason of being under the influence of intoxicating liquor or drugs or for any other reason. 2006, c. 19, Sched. G, s. 4

Duress. In *Buckland v. Buckland*, [1967] 2 All E.R. 300, the Court held that three factors are required to show duress: (1) the person must be sufficiently afraid to remove the element of voluntary consent to the marriage; (2) the fear must be reasonable in light of the circumstances; and (3) the fear must arise from external circumstances for which the party is not himself or herself responsible. The threatened consequences need not be directed against the person being urged to marry, but can include others, for example, members of that person's family. Nor does the pressure giving rise to duress need to be exerted by the other party to the marriage; for example, pressure to marry could be applied upon a party by his or her own family or some other external source.

Mistake. In *Iantsis v. Popatheodorou*, [1971] 1 O.R. 245, [3 R.F.L. 158, 15 D.L.R. (3d) 53 (C.A.) the Ontario Court of Appeal held that the only mistakes effective to invalidate a marriage are mistakes going to the identity of the other party or the nature of the ceremony. A mistake as to identity must concern the actual identity of the person. A person must believe he or she is marrying X when, in reality, he or she is marrying Y. A mistake as to the characteristics of a person, such as his or her wealth, background, or moral character, is not sufficient to render consent defective. Circumstances giving rise to a mistake as to the nature of the ceremony will be rare. Such a mistake may arise, for example, where the language or customs of the jurisdiction are not known to one of the parties.

Motive. Most people who go through a marriage ceremony do so with a view to living together in a family environment. The validity of a marriage has sometimes been questioned where the parties marry for reasons other than this socially accepted one. The most common type of

"improper purpose" marriage is an "immigration marriage", a marriage entered into solely for the purpose of enabling one of the parties to enter or remain in a country in which he or she otherwise could not. Courts have generally been reluctant to inquire into a person's intention in entering into marriage. Whether a marriage is "real" or not is too subjective a matter to be a test of general application. In *Iantsis v. Papatheodorou*, *supra*, the Ontario Court of Appeal held that where the parties understood they were going through a marriage ceremony and understood who they were marrying, the motive for undergoing the ceremony is irrelevant. Case authorities have established that "immigration marriages" are not invalid for that reason alone. (See, for example, *Singla v. Singla* (1985), 46 R.F.L. (2d) 235 (N.S.T.D.).)

The materials that follow examine some of these requirements in more detail.

(i) Duress

One of the situations giving rise to nullity actions based on duress is parental pressure. When does "pressure" constitute duress? When does an arranged marriage turn into a "forced" marriage?

S. (A.) v. S.(A.)
(1988), 15 R.F.L. (3d) 443 (Ont. U.F.C.)

MENDES DA COSTA U.F.C.J.: – In this case, the applicant is A.S. and the respondent is A.S. The applicant seeks the annulment of her marriage to the respondent or, in the alternative, a divorce. [It appears that the applicant's preferred remedy was annulment even though a divorce would have been available on the grounds of one year of living separate and apart.] The respondent did not file an answer or appear at the hearing. ...

1. *The facts*

The applicant was born on 9th April 1969. On 28th February 1986 she went through a form of marriage with the respondent, who had recently arrived in Canada. The marriage was celebrated at the city hall, Hamilton, and the certificate of marriage was filed as Ex. 2. At this date, the applicant was 16 years of age. Her parents had separated, and she was living with her mother and her stepfather. The consent of the mother to the marriage was contained in a certificate of consent filed as Ex. 3.

Paragraph 8 of the application contains the grounds for relief and comprises subparas. (a) to (e). Subparagraphs (b), (c) and (d) read as follows:

> (b) The applicant married the respondent after considerable pressure being applied against her by her natural mother and step-father. The applicant did not know the respondent but was told that he would be ordered to leave Canada unless he married a Canadian citizen.
>
> (c) The applicant's mother and step-father were to receive $500,000 for arranging to have the applicant marry the respondent. This was the motive for their participation. The applicant was particularly sensitive to the pressure because there was a history of sexual abuse by the step-father toward her. In fact, the applicant was removed from the home for a period of three years by the Children's Aid Society in Calgary Alberta because of this abuse.
>
> (d) The applicant never lived with the respondent and she has never had sexual intercourse with him.

The applicant stated that she was first approached by her mother and her stepfather, who applied pressure to her to marry the respondent. The applicant was told that the respondent wished to marry because he wanted to live in Canada. She testified that her mother and step-father told her that there was $2,000 involved and that they said that "we can have all this nice stuff that we didn't have before with all this money." The applicant said that she told her mother that she did

(ii) Limited Purpose Marriage (Immigration Marriages)

The leading Canadian decision on the legal implications of a marriage entered into only to facilitate immigration is the decision of the Ontario Court of Appeal in *Iantsis v. Papatheodorou,* [1971] 1 O.R. 245, 3 R.F.L. 158, 15 D.L.R. (3d) 53 (C.A.) which held that where the parties understood they were going through a marriage ceremony and understood who they were marrying, the motive for undergoing the ceremony is irrelevant. The *Iantsis* case is extensively reviewed in *S. (A.) v. S.(A.)*, above. As the following readings show, questions have been raised about the soundness of the *Iantsis* ruling.

Asser v. Peermohamed
(1984), 40 R.F.L. (2d) 299 (Ont. H.C.)

[Note: this case is generally regarded as inconsistent with current legal authority but is included to stimulate critical reflection.]

CHARTRAND L.J.S.C.:—The lady petitioner, a Canadian resident, went to Kenya to marry a citizen of that country. After the ceremony the parties immediately parted. The petitioner stayed at the home of friends and slept there alone for several days. Then she took the plane back to Canada without seeing her alleged husband again. Indeed, I do not have even the evidence of a kiss between the parties.

As soon as a year elapsed since the said ceremony, the lady launches this petition for divorce on the ground of non-consummation for over a year.

I have no evidence on her part that she was willing, ready, and able to have sexual relations with the respondent; indeed, the conduct of the parties in Kenya immediately after the form of marriage points to a pre-nuptial agreement between the parties to abstain, inter alia, from sexual relations. So she cannot be heard now to complain about non-consummation when she got exactly what she bargained for.

The petition is therefore dismissed.

There is a second ground for rejecting this petition. The circumstances of this case give rise to the question whether or not there was a real marriage. If not, I cannot divorce a non-existing marriage.

After her return to Canada the petitioner approached the immigration authorities as a sponsor to obtain a landed immigrant status for her alleged husband; and the only relation she had with the respondent was some correspondence about his immigration matter. For some reason — the evidence is vague on this subject — the immigration scheme did not succeed and the respondent is still in his country.

The immediate parting of the parties after the alleged marriage ceremony and the sponsorship steps taken in Canada by the petitioner lead me to conclude that this form of marriage was a mere device to facilitate the immigration of the respondent into Canada.

The marriage status is constituted of a bundle of rights and duties, of privileges and obligations, which may vary according to the age, culture, wealth, class and temperament of each individual, but if the content of that status can be elastic, it must still be a bundle of something; stretched too thinly, the concept snaps.

In this case the only relationship contemplated by both parties was one of immigration sponsorship, and this has no matrimonial connotation. That the respondent does not want to migrate to Canada anymore is irrelevant and immaterial; it is the state of mind at the time of the purported marriage that counts.

This case is distinguishable from *Iantsis v. Papatheodorou*, [1971] 1 O.R. 245, 3 R.F.L. 158, 15 D.L.R. (3d) 53 (C.A.). In the latter case one party unsuccessfully requested an annulment on the ground that the other party deceived her about his motive to marry, whereas in the present